EDITOR'S NOTE

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No. 85-5542

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

ALVIN BERNARD FORD, OR CONNIE FORD,
individually, and as next friend
on behalf of ALVIN BERNARD FORD,
Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary
Department of Corrections,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED

Whether the Eighth and Fourteenth Amendments permit the states to execute a person who appears to be mentally incompetent without having first determined his competency through a reliable and accurate factfinding procedure?

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SECONDARY AUTHORITY

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, ALVIN BERNARD FORD, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed January 17, 1985, upon which rehearing was denied on June 3, 1985.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is reported at 752 F.2d 526 (11th Cir. 1985), and is set out at pages 1a-10a of the Appendix.[1] The order denying rehearing is set out at App. 11a.

JURISDICTION

The judgment and opinion of the Court of Appeals were filed on January 17, 1985, and petitioner's timely petition for rehearing was denied on June 3, 1985. Thereafter, this Court entered an order extending the time within which the petition for writ of certiorari could be filed to and including October 1, 1985. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] Citations to the Appendix accompanying this petition are designated App. ___.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

It also involves Section 922.07, Florida Statutes (1983), which is set out at App. 12a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Alvin Bernard Ford is under sentence of death in the State of Florida. The validity of his conviction and death sentence has previously been litigated, see Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, _____U.S._____, 104 S.Ct. 201 (1983), and is no longer in issue. The present proceedings are concerned solely with the constitutionality of Florida's effort to execute Mr. Ford despite the substantial evidence of his present insanity.

On October 20, 1983, counsel for Mr. Ford invoked the procedures of Fla. Stat. § 922.07 (1983), relating to the competency of a condemned inmate. Pursuant to this statute, the Florida governor appointed a commission of three psychiatrists to evaluate Mr. Ford's current sanity. The commission members each reported their findings to the governor in writing, and without further proceedings, on April 30, 1984 the governor signed a Death Warrant for Mr. Ford.

On May 21, 1984, Mr. Ford's attorneys filed in the state trial court a Motion for a Hearing and Appointment of Experts for Determination of Competency to be Executed, and for a Stay of Execution During the Pendency Thereof, together with a supporting memorandum of law and an extensive appendix containing documentation of Mr. Ford's incompetency. The trial court denied the

motion without a hearing and without findings. On appeal, the Florida Supreme Court also denied relief, holding that there is no judicial review in Florida of the governor's determination of competency to be executed. Ford v. State, 451 So.2d 471, 475 (Fla. 1984). App. 13a-17a.

Thereafter, counsel for Mr. Ford filed a petition for habeas corpus in the United States District Court for the Southern District of Florida, claiming inter alia that the Constitution prohibited his execution if presently insane and accordingly, entitled him to a determination of his present sanity in an evidentiary hearing. On May 29, 1984, the District Court denied the petition without a hearing, holding in the alternative that it constituted abuse of the writ, and that Florida's compliance with § 922.07 adequately protected Mr. Ford's constitutional right, if any, not to be executed when insane. App. 18a-30a.

On May 30, 1984, the Court of Appeals granted a certificate of probable cause and stayed Mr. Ford's execution. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984). App. 31a-38a. This Court thereafter denied respondent's motion to vacate the stay, Wainwright v. Ford, _____U.S._____, 104 S.Ct. 3498 (1984). App. 39a-40a. Respondent Wainwright then filed a suggestion in the Court of Appeals that the appeal be heard initially en banc, because

> the question of whether there is an Eighth Amendment right not to be executed while insane and if so, what procedures are required to satisfy it, is one of first impression. Its determination will affect capital litigation in this Circuit and nationwide.

Respondent's Suggestion of En Banc Consideration, August 23, 1984, at 7. Following argument before a panel, respondent's suggestion was noted to be moot, Ford v. Wainwright, 747 F.2d 1357 (11th Cir. 1984), and the panel thereafter affirmed the District Court's disposition of the merits of Mr. Ford's claim by a 2-1 vote. Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985). Rehearing en banc was denied.

B. Material Facts

In the two-year period following December, 1981, Alvin Ford's mental health gradually but pervasively deteriorated. By November, 1983, a psychiatrist confirmed prior opinion that Mr. Ford had become psychotic and found him incompetent to be executed. At that time Mr. Ford thought that he was on death row at Florida State Prison only because he chose to be there. He thought that the case of "Ford v. State" had ended capital punishment in Florida and, in particular, had deprived the State of Florida of the right to execute him. After November, 1983, his incapacity worsened. He lost the ability to communicate by conventional means. He could only mutter softly to himself, making gestures in which there seemed to be a message, but a message that no one could decipher. This was his condition at the time these proceedings began in May, 1984.

The process of Mr. Ford's deterioration to this condition began so gradually that at first it was almost imperceptible. Until late December or early January, 1982, he seemed to be in relatively good mental health. There were no symptoms, nor even precursors to the symptoms, of psychosis. Nor had there been during any of the time since Mr. Ford's arrest in 1974. Thus, no question of competency had been raised before, during, or after his trial. But gradually, from December, 1981 on, Mr. Ford lost touch with external reality.

The most obvious sign of Mr. Ford's loss of contact with reality has been his experience of delusions.[2] At first, in late 1981 and early 1982, Mr. Ford's delusions appeared as occasional peculiar ideas and misperceptions. App. 53a-56a. Gradually, however, delusions took over his entire conscious existence. The delusions eventually centered on his belief that

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2 A delusion is "[a] false personal belief based on incorrect inference about external reality and firmly sustained in spite of what almost everyone else believes and in spite of what constitutes incontrovertible and obvious proof or evidence to the contrary." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 356 (Third Edition 1980). Delusional thinking is "[t]he major disturbance in the content of thought" that accompanies schizophrenia, id. at 181, and is thus, "[d]irect evidence of psychotic behavior...," id. at 367.

the Ku Klux Klan was holding his family and other people hostage in Florida State Prison in order to drive him to insanity and suicide. App. 72a-91a.[3] As Mr. Ford's delusions took hold, some auditory and olfactory hallucinations began accompanying the delusions. See, e.g., App. 75a, 85-86a. By the summer of 1983, however, his delusions began to change. Mr. Ford somehow gained the power to free the hostages, to fire and prosecute the officers responsible, and to replace and add to the Justices of the Florida Supreme Court. App. 88a-92a. In this period, he also began to refer to himself as Pope John Paul III. Id. It was during this time that he began to say, for the first time, that the state could not execute him.

By November, 1983, Mr. Ford's communications became more fragmented. He was no longer centered on any particular subject, but would "carry on" about a multiplicity of subjects all in one uninterrupted breath. See, e.g., App. 93a-94a. An example of this behavior was recorded by Dr. Harold Kaufman, a psychiatrist who evaluated Mr. Ford on November 3, 1983 at the request of Mr. Ford's counsel:

> Mr. Ford:
>
> > The guard stands outside my cell and reads my mind. Then he puts it on tape and sends it to the Reagans and CBS...I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed...CBS is trying to do a movie about my case...I know the KKK and news reporters all disrupting me and CBS knows it. Just call CBS crime watch...there are all kinds of people in pipe alley (an area behind Mr. Ford's cell) bothering me -- Sinatra, Hugh Heffner, people from the dog show, Richard Burr, my sisters and brother trying to sign the death warrants so they don't keep bothering me...I never see them, I only hear them especially at night. (Note that Mr. Ford denies seeing these people in his delusions. This suggests that he is honestly reporting what his mental processes are.) I won't be executed because of no crime...maybe because I'm a smart ass...my family's back there (in pipe alley)...you can't

[3] The Klan undertook this campaign against Mr. Ford because he had found strong evidence, through his ability to perceive events occurring beyond the normal limits of perception, implicating the Klan in the arson of a house in Jacksonville in which a black family was killed. App. 56a-68a.

> evaluate me. I did a study in the army...a lot of masturbation...I lost a lot of money on the stock market. They're back there investigating my case. Then this guy motions with his finger like when I pulled the trigger. Come on back you'll see what they're up to -- Reagan's back there too. Me and Gail bought the prison and I have to sell it back. State and federal prisons. We changed all the other countries and because we've got a oretty good group back there I'm completely harmless. That's how Jimmy Hoffa got it. My case is gonna save me.

App. 157a (Comments in parentheses are those of Dr. Kaufman).

In this same interview that Dr. Kaufman asked Mr. Ford, "Are you going to be executed?" Mr. Ford replied, "I can't be executed because of the landmark case. I won. Ford v. State will prevent executions all over." App. 158a. Dr. Kaufman continued:

> Dr. Kaufman (Q): Are you on death row?
>
> Mr. Ford (A): Yes.
>
> Q: Does that mean that the State intends to execute you?
>
> A: No.
>
> Q: Why not?
>
> A: Because Ford v. State prevents it. They tried to get me with the FCC tape but when the KKK came in it was up to CBS and the Governor. These prisoners are rooming back there raping everybody. I told the Governor to sign the death warrants so they stop bothering me.

Id.

In December, 1983, communication with Mr. Ford became virtually impossible. In two interviews, on December 15 and December 19, he spoke in a fragmented, code-like fashion. At times during these interviews, Mr. Ford appeared to be trying to respond to questions posed to him, but he seemed incapable of communicating by any of the conventional methods with which people communicate. See App. 102a-107a.[4]

Four psychiatrists evaluated Mr. Ford's competency during this latter part of 1983: Dr. Harold Kaufman and the three psychiatrists appointed by the governor pursuant to Fla. Stat. §

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[4] The second of these interviews, on December 19, was the interview conducted by the psychiatrists appointed by Governor Graham pursuant to Fla. Stat. § 922.07.

922.07 (Drs. Peter Ivory, Umesh Mhatre, and Walter Afield). Dr. Kaufman, Dr. Mhatre, and Dr. Afield concluded that Mr. Ford suffered from psychosis. App. 158a, 164a, 166a. Dr. Kaufman further concluded that Mr. Ford's psychosis was of such severity "that he cannot sufficiently appreciate or understand either the reasons 'why the death penalty was imposed upon him' or 'the purpose' of this punishment." App. 159a. Despite their agreement with Dr. Kaufman concerning Mr. Ford's psychosis, Dr. Mhatre and Dr. Afield concluded nevertheless that Mr. Ford was competent.[5]

Substantial grounds were proffered to the District Court for believing that the opinions of the three psychiatrists appointed by the governor were based upon inadequate procedures. In preparation for the hearing which counsel for Mr. Ford anticipated in the state trial court, counsel asked two forensic psychiatrists, Dr. Seymour Halleck and Dr. George Barnard, both of whom are widely acclaimed within their field, to review the process by which Dr. Ivory, Dr. Mhatre, and Dr. Afield evaluated Mr. Ford. Dr. Halleck and Dr. Barnard concluded that the evaluations conducted by the three appointed psychiatrists were unreliable, and that they failed to measure up to the minimum standards for forensic evaluation. The reasons for this were the appointed psychiatrists' failure to consider much of the available data concerning Mr. Ford's mental status, their failure to document the factual basis for their conclusions concerning competency in the face of pervasive data supporting the contrary conclusion of Dr. Kaufman, and the great likelihood that the inappropriate

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[5] Thus, only the third psychiatrist appointed by Governor Graham, Dr. Ivory, found Mr. Ford to be suffering from no genuine illness. As to the genuineness of Mr. Ford's illness, however, it should be noted that a fifth psychiatrist, Dr. Jamal Amin, also evaluated Mr. Ford. Dr. Amin evaluated Mr. Ford periodically during the course of his deterioration, from before December, 1981 through June, 1983. Dr. Amin concluded that Mr. Ford had developed a profound form of schizophrenia during this time and documented why Mr. Ford's illness was genuine. App. 153a-155a. Dr. Amin was not able to render an opinion concerning Mr. Ford's competency after June, 1983, however, because Mr. Ford refused to be interviewed thereafter by him.

conditions under which Mr. Ford was interviewed would produce insufficient data for reliable forensic evaluation. See App. 169a-173a, 187a-193a.

Even with these serious deficiencies, however, Dr. Mhatre and Dr. Afield found that Mr. Ford suffered from a psychotic illness. Dr. Mhatre observed that "without [appropriate anti-psychotic] medication [Mr. Ford] is likely to deteriorate further and may soon reach a point where he may not be competent for execution." App. 164a. In the months following Dr. Mhatre's observation, his prediction of further deterioration was strikingly confirmed.

On May 23, 1984, Dr. Kaufman attempted to interview Mr. Ford for two hours at Florida State Prison. He observed the following:

> [Mr. Ford] appeared to have lost at least twenty (20) pounds since I had last examined him on November 3, 1983. He was neatly dressed and was wearing rubber shower sandals. He did not greet the four of us as we entered and sat down. He sat with his body immobile and his handcuffed hands in a prayerful position in front of his mouth. Occasionally he moved his hands, still in the praying mode, to each of us for no apparent reason. His lips were pursed intermittently, but his head moved little. His eyes were closed or fluttering most of the time, although he occasionally glanced at one or more of us. His hands and fingers appeared to be trembling. We took turns asking him questions, and little or no response was forthcoming. He began muttering to himself after about five minutes. These utterances were largely unintelligible. This is the overall picture of what took place for two hours.

App. 167a. These observations led Dr. Kaufman to conclude that "Mr. Ford's condition, severe paranoid schizophrenia, has seriously worsened, so that he now has only minimal contact with the events of the external world," and to reconfirm his opinion that Mr. Ford was incompetent to be executed. App. 168a.

These were the facts that were proffered in the District Court on May 29, 1984, in response to which the court -- like the governor and the state courts before it -- held no hearing.

C. How the federal question was presented and decided in the courts below

After exhausting state remedies, counsel for Mr. Ford filed the present federal habeas corpus petition presenting the question herein as shown in the Appendix, at pages 48a, 110a-111a. The District Court denied the petition with the following statement:

> I find that there is an abuse of the writ throughout this matter. But reaching the merits as well I find no reason to grant the relief sought by the Petitioner. The Governor of this State acting under 922.07 the Court finds that he has acted properly, has followed the steps. Each of the three psychiatrists whom he appointed has found the Defendant sufficiently competent to be executed under the law and so on the merits, as well as on this issue, the petition must fail.

App. 27a-28a.

In his appeal to the Court of Appeals thereafter, Mr. Ford's counsel presented the question herein in the form of three issues:

> 1. Whether the eighth amendment's prohibition of cruel and unusual punishment forbids the execution of a condemned person who is incompetent at the time of execution?
>
> 2. If the eighth amendment does forbid the execution of the incompetent, whether a federal habeas court must hold an evidentiary hearing to determine the competency of such a person, where the only prior state determination of competency was made in an ex parte, non-judicial proceeding?
>
> 3. Whether a state-created entitlement not to be executed when incompetent can be withdrawn without due process of law?

Brief for Petitioner-Appellant, at 1. The Court of Appeals decided these issues as follows:

> If the matter were being presented for the first time, Ford's contention might present considerable difficulty. The panel majority, however, feels that Ford's contention is foreclosed by binding authority. In Solesbee [v. Balkcom, 339 U.S. 9 (1950)] the Supreme Court examined a Georgia procedure which was virtually identical to that now incorporated in the Florida statute. In the controlling portion of the opinion the Supreme Court held "We are unable to say that it offends due process for a state to deem its Governor an 'apt and special tribunal' to pass upon a question so closely related to powers that from the beginning have been entrusted to governors." Solesbee v. Balkcom, 339 U.S. at 12, 70 S.Ct. at 458 (footnote omitted).

752 F.2d at 528 (App. 3a).

REASONS FOR GRANTING THE WRIT

THE EIGHTH AND FOURTEENTH AMENDMENTS CAN NO LONGER TOLERATE EXECUTION OF THE QUESTIONABLY COMPETENT WITHOUT A PRIOR DETERMINATION OF COMPETENCY THROUGH A RELIABLE PROCEDURE

A. Introduction

All of the states which have the death penalty agree that a condemned person cannot be executed if, at the time of execution, he or she is mentally incompetent. Among civilized people, this consensus is not new. For at least seven hundred years, the common law has forbidden execution of the presently incompetent as a "savage and inhuman" act[6] and "a miserable spectacle ... of extreme inhumanity and cruelty,"[7] that is "repugnant to the moral traditions of Western civilization."[8]

Notwithstanding the consensus of the states and the singular command of the common law from the middle ages to the present, the Court has never decided whether the Constitution prohibits the execution of a presently incompetent person. Nor has the Court decided, since the demise of the right-privilege distinction, whether a state-created entitlement to be spared from execution if incompetent gives rise to a federally-protected right to a fair and reliable determination of competency in a particular case.

Florida should not be allowed to take the life of Alvin Ford until these questions are answered, for Mr. Ford's case -- unlike any other post-Furman case -- presents these questions on the merits, without any serious question of abuse of the writ or other procedural bar,[9] and upon a record that creates, at a

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6 4 W. Blackstone, Commentaries on the Laws of England 24 (1768).

7 E. Coke, Third Institute 6 (1644).

8 Royal Commission on Capital Punishment, 1949-1953 Report 98 (1953).

9 Cf. Woodard v. Hutchins, ___ U.S. ___, 104 S.Ct. 752 (1984); Goode v. Wainwright, 731 F.2d 1482 (11th Cir.), cert. den., ___ U.S. ___, 104 S.Ct. 1721 (1984). In contrast to these cases, in its opinion staying Mr. Ford's execution, the Court of Appeals found, after extensive discussion, "no evidence in the record to suggest that the incompetency issue was

minimum, substantial doubt about his present competency that has not been resolved satisfactorily through the summary proceedings before the governor and the lower courts, and that cannot be resolved satisfactorily without a hearing.[10]

Throughout the proceedings in the courts below, the State of Florida has sought to avoid decision of these questions by arguing alternatively that Solesbee v. Balkcom, 339 U.S. 9 (1950), has already decided the questions, and in any event, that Florida is not about to execute an incompetent person, because the governor of Florida has found Mr. Ford to be competent. Thus far, the State's strategy has worked, for no court -- state or federal -- has decided the questions through a considered analysis of the merits.

Such reasoning must not be allowed to dissuade the Court from deciding these difficult, unanswered questions. The Court has already declared unequivocally in Mr. Ford's case, in refusing to dissolve the stay of execution previously ordered by the Court of Appeals, that "[t]his Court has never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane...." 104 S.Ct. at 3498 n.* (emphasis supplied). Since the Court made this statement in the face of the State's argument that Solesbee was controlling, see

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available in December of 1981 when Ford's first [federal habeas] petition was filed...." 734 F.2d at 539. Indeed the process of Mr. Ford's deterioration only began in December of 1981. Because that process was gradual, the question of competency did not even begin to arise until late 1982 or 1983. Since Mr. Ford's appeals from the District Court's denial of his first petition were pending from December 10, 1981 through October 3, 1983, the Court of Appeals concluded that Mr. Ford had not abused the writ by failing to file a second petition while the appeals from the first petition were still pending. 734 F.2d at 540 & n.1. Further, the Court indicated that if the law "might and should evolve to impose such a duty, we would not be inclined to [find abuse of the writ] without the benefit of an evidentiary hearing to give Ford and his counsel an opportunity to explain their actions [,]... [which] would fall more clearly under Rule 9(a) of the Rules governing § 2254 cases ...." 734 F.2d at 540 n.1. On appeal, the panel did not readdress this matter, simply noting that, "The summary holding of abuse of the writ on the insanity issue is troublesome under the facts presented. In light of our resolution of the merits of this issue, however, it is not necessary that we reach the question." 752 F.2d at 527 n.1.

10 Cf. Gray v. Lucas, 710 F.2d 1046 (5th Cir.), cert. den., ___U.S.___, 104 S.Ct. 211 (1983).

Application of the State of Florida to Vacate Order of Eleventh Circuit Granting Stay of Execution, and Supplement thereto, at 6-9 and 5-6 respectively, May 31, 1984 (No. A-980), the Court plainly considered whether Solesbee controls and decided that it does not. And, whether Florida is about to execute an incompetent person cannot be answered simply by saying that the governor has found Mr. Ford competent. Whether that finding rests upon procedures consistent with the Constitution is the very question that this Court is being asked to address in Mr. Ford's case.

As we demonstrate, this issue should be addressed in Mr. Ford's case. The time is right, because

> *** executions are now occurring with sufficient frequency that the issue will continue to arise until it is decided by the Court;[11] and
>
> *** constitutional principles have evolved over the past two decades that now forbid the questionably competent to be executed solely upon the whim of the state executive, but without guidance from this Court the lower courts may well decide to avoid the analysis required by that doctrinal evolution -- as the Eleventh Circuit did in Mr. Ford's case --through misplaced adherence to Solesbee v. Balkcom.

Further, Mr. Ford's case is the right case in which to review this issue. No case could demonstrate any better the need for the reliable factfinding procedure that the Eighth and Fourteenth Amendments would require in the determination of competency to be executed. Only that procedure -- not the ex parte procedure of determining competency wholly on the basis of three psychiatrists' written reports, as now utilized by Florida -- can assure accuracy in the determination of competency in a case like Mr. Ford's, for in his case

> *** four of the five psychiatrists who have evaluated him have concluded that he suffers from a severe psychotic illness;

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11 This is not to say, however, that a determination by the Court would encourage frivolous assertions of incompetency. See p. 32 & n. 26, infra. The current record in Florida has established that it would not. And even if it did, the courts are well-equipped to identify and dispose of such claims quickly and efficiently. Id.

*** among these five psychiatrists, four have also rendered opinions about Mr. Ford's competency, and these opinions are in sharp conflict;

*** one of these psychiatrists has concluded that Mr. Ford is incompetent to be executed, and in comparison to the other psychiatrists who have addressed the competency issue, has spent substantially more time interviewing Mr. Ford in an appropriate setting, has more thoroughly reviewed his history, and has fully explained and documented the relation between Mr. Ford's psychosis and his competency to be executed;

*** in contrast, the three psychiatrists who have concluded that Mr. Ford is competent have interviewed him perfunctorily in a setting not conducive to reliable mental status evaluation; and one of these three has failed as well to consider most of the available historical and symptomatic data necessary to evaluate Mr. Ford, while the other two have failed altogether to explain why, in light of their conclusions that Mr. Ford is psychotic, they nonetheless believe that he is competent; and

*** nationally-recognized experts in forensic psychiatry have concluded that the manner in which these three psychiatrists evaluated Mr. Ford's competence to be executed was not likely to produce reliable conclusions, because of these deficiencies in their examination procedures and reasoning.

If the Eighth Amendment prohibits execution of the incompetent, or if the Fourteenth Amendment requires procedural safeguards in the determination of competency under a state law prohibition against execution of the incompetent, the Constitution cannot tolerate the resolution of Mr. Ford's competency -- on these facts -- by a procedure which has allowed no opportunity for Mr. Ford's counsel to prove, as these facts so clearly suggest, that Mr. Ford is incompetent.

B. **Solesbee v. Balkcom** did not decide whether the Constitution prohibits execution of the incompetent, but modern Eighth Amendment jurisprudence requires that this issue be decided

The Court of Appeals held that Mr. Ford's claim that the Eighth Amendment prohibits the execution of the presently incompetent had already been decided in Solesbee v. Balkcom, which held that a Georgia procedure similar to Fla. Stat. § 922.07 does not "offend[] due process...," 339 U.S. at 12. Ford v. Wainwright, 752 F.2d at 528. In so disposing of Mr. Ford's

Eighth Amendment claim, the Court of Appeals fundamentally confused and intermingled the due process analysis of Solesbee with the Eighth Amendment analysis required by Mr. Ford's claim.

In plain terms, Solesbee did not decide whether the Constitution substantively prohibited the execution of the presently incompetent; it decided only whether the Due Process Clause of the Fourteenth Amendment, as then interpreted, was offended by "the method applied by Georgia here to determine the sanity of an already convicted defendant...." 339 U.S. at 11. The Court did not reach the substantive issue, because in 1950 the only constitutional limitation upon the states' power to punish was the Due Process Clause. The Eighth Amendment's prohibition against cruel and unusual punishment was not to be incorporated into the Due Process Clause for another twelve years. See Robinson v. California, 370 U.S. 660 (1962). And in 1950, the Due Process Clause guaranteed only the fundamental procedural rights attendant to trials of guilt or innocence, which were generally held to be unavailable in sentencing proceedings. See Williams v. New York, 337 U.S. 241, 245-46 (1949). Accordingly, the Solesbee Court held that the procedural rights guaranteed by the Due Process Clause were unavailable to challenge the manner in which sanity was determined after conviction and sentencing. 339 U.S. at 12.

That Solesbee, in 1950, did not decide the Eighth Amendment issue presented by counsel for Mr. Ford is even clearer when one examines the doctrinal evolution brought about by the incorporation of the Eighth Amendment into the Fourteenth Amendment. With that development, the Constitution for the first time began to limit the states' power to punish -- both as to sentencing procedures and as to sentences themselves. As a result, the Court has felt compelled to reconsider many of its earlier due process decisions, most frequently and notably with respect to the states' procedures for inflicting capital punishment. The Court has expressly recognized that its earlier precedents upholding state capital procedures against due process challenges require reconsideration and often a contrary result when the same

procedures are challenged under the Eighth Amendment. See, e.g., Gardner v. Florida, 430 U.S. 349, 355-58 (1977) (plurality opinion); id. at 363-64 (White, J., concurring); Lockett v. Ohio, 438 U.S. 586, 597-99 (1978) (plurality opinion of Burger, C.J.) ("Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in McGautha [v. California, 402 U.S. 183 (1971)] became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in Furman [v. Georgia, 408 U.S. 238 (1972)]"). The reason for this is that under the Eighth Amendment there must be greater reliability "in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), than due process requires generally for determinations in criminal cases. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, supra; Gardner v. Florida, supra.[12] Accord, Caldwell v. Mississippi, ___U.S.___, 105 S.Ct. 2633 (1985). Hence, procedures that otherwise comport with the Fourteenth Amendment have been held not to satisfy the Eighth Amendment's requirement of enhanced reliability. See, e.g., Beck v. Alabama, 447 U.S. 625 (1980); Green v. Georgia, 442 U.S. 95 (1979); Gardner v. Florida, supra.

For these reasons, until the Court of Appeals rendered its anomalous decision in Mr. Ford's case, every lower federal court confronted with the same issue had held, as the Eleventh Circuit itself had in Goode v. Wainwright, that "[t]here has been no conclusive determination whether there is such a constitutional entitlement [not to be executed if incompetent] under federal law." 731 F.2d at 1483 (citing Gray v. Lucas, 710 F.2d at 1053-54). Accord Ford v. Strickland, 734 F.2d at 539 (granting stay of execution). Thus, when Justice Powell wrote for the plurality, in upholding Mr. Ford's stay, that "[t]his Court has

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[12] See also Barefoot v. Estelle, 463 U.S. 880, 924 (1983) (Blackmun, J., dissenting); Eddings v. Oklahoma, 455 U.S. at 118 (O'Connor, J., concurring); Godfrey v. Georgia, 446 U.S. 420, 443 (1980) (Burger, C.J., dissenting).

never determined whether the Constitution prohibits execution of a criminal defendant who currently is insane," Wainwright v. Ford, 104 S.Ct. at 3498, he was demonstrably correct.

Because of its mistaken deference to Solesbee, the majority of the panel in the Court of Appeals refused to consider the merits of the Eighth Amendment question presented by counsel for Mr. Ford. The panel majority did recognize, however, that "[i]f the matter were being presented for the first time, Ford's contention might present considerable difficulty." 752 F.2d at 528. The reason that the Court of Appeals majority was so troubled about the merits of Mr. Ford's claim -- and the reason that this Court should decide to review his claim -- is that the principles of Eighth Amendment jurisprudence provide powerful support for the claim that the Constitution prohibits execution of the incompetent.

First, the original intent of the Framers of the Bill of Rights in prohibiting "cruel and unusual punishments" was "to provide at least the same protection [to United States citizens] -- including the right to be free from excessive punishments," Solem v. Helm, ___U.S.___, 103 S.Ct. 3001, 3007 (1983), as had been accorded English subjects. See also Furman v. Georgia, 408 U.S. 238, 264 (1972) (Brennan, J., concurring) (summarizing the Court's early Eighth Amendment decisions as "concluding simply that a punishment would be 'cruel and unusual' if it were similar to punishments considered 'cruel and unusual' at the time the Bill of Rights was adopted"); McGautha v. California, 402 U.S. 183, 226 (1971) (Black, J., concurring) (same). Accord, T. Cooley, A Treatise on Constitutional Limitations, 472-73 (7th ed. 1903). At the time the Bill of Rights was framed, the execution of the incompetent had been strictly forbidden in England for at least five hundred years as "savage and inhuman" and "a miserable spectacle ... of extreme inhumanity and cruelty." See, e.g., 2 J. Stephen, A History of the Criminal Law of England 151 (1883) (tracing the treatment of insanity from the mid-thirteenth century); FitzHerbert, Natura Brevium 202 (1534) (quoted in Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1931-32)); E. Coke, Third

Institute 6 (1644); 1 M. Hale, The History of the Pleas of the Crown 35 (1736); 4 W. Blackstone, Commentaries on the Laws of England 24-25 (1768).[13] Accordingly, even under the most restrictive reading of the Eighth Amendment -- that it was intended to prohibit only those punishments forbidden as cruel and unusual under English law at the time the Bill of Rights was enacted -- there is no doubt that it proscribed as "cruel and unusual" the execution of the incompetent. It would require blinders to history to hold otherwise.

Moreover, there is absolutely no indication that the Framers intended the execution of the incompetent to be excepted from the punishments deemed cruel and unusual at the time the Eighth Amendment was adopted. To reach this conclusion, one would have to assume that the Framers intended "American law [to be] more brutal than what is revealed as the unbroken command of English law for centuries preceding the separation of the Colonies." Solesbee v. Balkcom, 339 U.S. at 20 (Frankfurter, J., dissenting). As to the execution of the incompetent particularly, there is no basis for such an assumption. See, e.g., 1 J. Chitty, A Practical Treatise on the Criminal Law 620 (Amer. ed. 1819) (carrying forward the proscription on execution of the incompetent, noting that it "was always thought cruel and inhuman"); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 15 (3d Amer. ed. 1836)(same); F. Wharton, A Treatise on the Criminal Law of the United States 50 (2d ed. 1852) (same).

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13 Even though the prohibition against executing the incompetent was so entrenched in English law, some have mistakenly referred to it as falling within the prerogative of the Crown as an act of grace. This, however, is a misreading of common law history. Though as a technical matter, one who was incompetent was excused from execution only by a "reprieve," this kind of reprieve was not a matter of grace but a matter of right. As Blackstone explained, there were two types of reprieves, the first was the "arbitrary reprieve" ("ex arbitria judicis") which was discretionary and could be granted, as its name implies, for any or no reason. The second was "ex necessitate legis" which as its name implies, was mandatory. The stay of execution due to incompetence fell into this latter category. It was a reprieve as a matter of right -- an "invarible rule" -- and could be raised by the judge or "plead[ed] in bar of execution." Blackstone at 394-97.

Second, apart from the "intent of the Framers" analysis, the execution of the incompetent fails as well to pass constitutional muster under the "evolving standards of decency" analysis. Under the first part of this two-stage analysis, execution of the incompetent falls below "contemporary standards of decency" as measured by the objective indicia of such standards. See generally Enmund v. Florida, 458 U.S. 782, 788-89 (1982) (discussing the objective indicia of contemporary standards -- "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made" -- that were considered in Coker v. Georgia, 433 U.S. 584, 592 (1977)). From the perspective of historical development, we have already shown that for seven hundred years the common law nations have prohibited execution of the incompetent. From the perspective of legislative judgments, all the states which have capital punishment forbid the execution of the incompetent.[14] And finally, from the perspective of international opinion, the prohibition is just as uniform, as reported by members of the United Nations.[15]

Under the second part of contemporary Eighth Amendment analysis, in which the Court, "informed by [the foregoing] objective factors to the maximum possible extent," Coker v. Georgia, 433 U.S. at 592, "bring[s] its own judgment to bear on the matter," Enmund v. Florida, 458 U.S. at 788-89, execution of the incompetent should be determined as well to fall below "the basic concept of human dignity at the core of the [Eighth] Amendment," Gregg v. Georgia, 428 U.S. 153, 182 (1976) (plurality opinion). The very reason that such executions have been proscribed for seven centuries is that they offend the concept of human dignity: as already noted, history has condemned the execution of an incompetent person as a "savage and inhuman act"

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14 See Ford v. Wainwright, 752 F.2d at 530-31 & n.2 (Clark, J., dissenting).

15 See Dept. of Econ. and Soc. Affairs, United Nations Doc. ST/SOA/SD/10, Capital Punishment: Developments 1961-1965 10 (1967); Dept. of Econ. and Soc. Affairs, United Nations Doc. ST/SOA/SD/9, Capital Punishment 15-16, 88 (1962).

and a "miserable spectacle ... of extreme inhumanity and cruelty," that is "repugnant to the moral traditions of Western civilization." It offends the most basic notions of fairness and decency to execute human beings in such a helpless condition -- unable to understand what is happening to them, to defend themselves as the law might still allow, to prepare for imminent death or to make peace with their God.[16]

Further, execution of the incompetent interferes with the condemned's right of access to collateral remedies -- a right of "fundamental importance ... in our constitutional scheme," Johnson v. Avery, 393 U.S. 483, 485 (1969). Just as a person must be competent in order to make the myriad of decisions, voluntarily and intelligently, that must be made at trial, a person must be competent in order to exercise meaningfully his right of access to collateral remedies. Unlike appeals, which concern claims already litigated, collateral proceedings are "original actions seeking new trials ... frequently rais[ing] heretofore unlitigated issues ...," Bounds v. Smith, 430 U.S. 817, 827-28 (1977), and, like trials, require voluntary and intelligent decision-making by the petitioner. See Shriner v. Wainwright, 735 F.2d 1236, 1240-41 (11th Cir.), cert. denied,

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16 A number of logical explanations have been advanced over the years to explain the prohibition against execution of the insane, some of which have been the subject of debate over their efficacy. See, e.g., Hazard and Louisell, Death, The State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 383-89 (1962). This debate, however, is quite beside the point, for regardless of the explanation it remains that execution of the insane has been prohibited and disapproved as savage, cruel and inhuman for centuries. "The more fundamental the beliefs [of a civilized society] are the less likely they are to be explicitly stated." Solesbee v. Balkcom, 339 U.S. at 16 (Frankfurter, J., dissenting). The "miserable spectacle" of execution of the insane is an act that thus strikes to the essence of basic human dignity:

> Such doctrines have been preached and practiced in National Socialist Germany, but they are repugnant to the moral traditions of Western civilization and we are confident that they would be unhesitatingly rejected by the great majority of the population of this country. We assume the continuance of the ancient and humane principle that has long formed part of our common law.

Royal Commission on Capital Punishment, 1949-1953 Report 98 (1953) (emphasis supplied).

___U.S.___, 82 L.Ed.2d 852 (1984) (a habeas corpus petitioner will be held to have waived his right to present facts and claims if he personally fails to assert such facts and claims as were known to him at the time of the habeas corpus proceeding, upon counsel's negligent or deliberate failure to assert such facts and claims).

Finally, execution of the incompetent does not measurably contribute to the penological justifications for capital sentencing: retribution and deterrence. Retribution is ill-served by the execution of the incompetent, for if it is meant to impress a moral lesson on the offender, the condemned person, by reason of his incompetence, cannot be brought by that specter to feel the respect for the law and society that a competent person should feel. If it is intended instead to act as a release or an "expression of society's moral outrage," Gregg, 428 U.S. at 183, then execution of the incompetent fails in that goal or even counteracts it. Under this theory of retribution, each wrong must be offset by a punitive act of the same quality. But when the prisoner is incompetent, a punishment of lesser value is being imposed. Accordingly, "the social goal of institutionalized retribution may be frustrated when the force of the state is brought to bear against one who cannot comprehend its significance". Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 454, 458-59 (1967).[17]

For similar reasons, deterrence of others is not served by execution of the incompetent. Lord Coke wrote centuries ago that executing an incompetent person "can be no example to others." Third Institute, at 6. This is so because "prospective offenders" of capital crimes, Gregg, 428 U.S. at 183, cannot identify with an incompetent person who is executed. See also Collinson, A Treatise on Law Concerning Idiots, Lunatics, and Other Persons Non Compos Mentis 472 (1812). Moreover, whatever the overall

[17] This retributive theory -- that the prisoner must know what is happending to him in order to satisfy the public need for vengeance -- may seem "unappealing to many, but," as the Court has said, "it is essential in an ordered society." Gregg, 428 U.S. at 183.

deterrent effect of the death penalty is itself, it would not be weakened by the withholding of it for those relatively few prisoners who become incompetent.

C. The evolution of Due Process jurisprudence since **Solesbee** requires that the Court reconsider whether a state-created entitlement to be spared from execution if incompetent gives rise to a federally-protected right to a fair and reliable determination of competency in a particular case.

Apart from his claim that the Eighth Amendment substantively prohibits the execution of the insane, Mr. Ford's counsel also argued in the courts below that the procedural due process protections of the Fourteenth Amendment are triggered by Florida's state-created right to be spared from execution when insane, but that Florida's procedure for determining the competence of a condemned person at the time of execution, pursuant to Fla. Stat. § 922.07, fails to afford the protections required by the Fourteenth Amendment. Even though Solesbee decided this procedural due process issue, the principles underlying its analysis have evolved to such an extent in the intervening decades, that we submit it is no longer of precedential value. Because of this, we urge the Court to reconsider the applicability of the Due Process Clause to the states' procedures for determining whether a condemned person is incompetent and thus entitled to be spared from execution under a state-created prohibition against executing the incompetent.

Since the decision in Solesbee, three significant evolutionary developments in due process jurisprudence have effectively overruled Solesbee as controlling precedent.

First, Solesbee was decided at a time when the procedural protections of the Due Process Clause were applicable only to "rights," not "privileges." See, e.g., Ughbanks v. Armstrong, 208 U.S. 481 (1908); Escoe v. Zerbst, 295 U.S. 490 (1935); Phyle v. Duffy, 34 Cal. 2d 144, 208 P.2d 668, 677-78 (1949) (Traynor, J., concurring in judgment). The classification of a particular interest as a right or a privilege turned critically upon the procedure which had been used historically to protect the interest. See Arnett v. Kennedy, 416 U.S. 134, 166-67 (1974)

(Powell, J., joined by Blackmun, J., concurring in part); id. at 210-11 & n. 7 (Marshall, J., joined by Brennan and Douglas, J.J., dissenting); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982). There is no better example of the operation of these principles than the Court's analysis in Solesbee, which relegated the interest of a condemned person in being spared from execution if incompetent to the status of a privilege, solely because of the procedure which the Court found to have been used historically to determine the competency of a person at the time of execution:

> The heart of the common-law doctrine has been that a suggestion of insanity after sentence is an appeal to the conscience and sound wisdom of the particular tribunal which is asked to postpone sentence.

339 U.S. at 13.[18]

Since Solesbee, the Court has firmly discarded "the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege,'" Graham v. Richardson, 403 U.S. 365, 374 (1971). See also Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970). Rather than examining the historical procedural protection accorded a particular interest, the post-right/privilege analysis focuses upon the "'objective expectation [of the individual], firmly fixed in state law and official ... practice,'" Vitek v. Jones, 445 U.S. 480, 489 (1980). If the individual has a "justifiable expectation," id., that the state will not arbitrarily withdraw a benefit conferred or withhold a benefit expected to be conferred, due process protects that individual's interest against "arbitrary disregard ...," Hicks v. Oklahoma, 447 U.S. 343, 346 (1980). In the post-right/privilege era of analysis, therefore, the Court has increasingly embraced the concept that

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18 Even here, however, it should be noted that the Solesbee Court's reliance upon the procedure by which the condemned's interest had historically been protected was misplaced. As we have demonstrated in footnote 13, supra, the suggestion of insanity after sentence historically was not an appeal to discretion but an appeal to enforce an absolute right.

state-created substantive rights do enjoy the procedural protection of the Due Process Clause, because of the "justifiable expectation" that such rights will not be withdrawn arbitrarily.

While there has been no application of the state-created rights analysis to the interest of a condemned person in being spared from execution if incompetent, the analysis has been applied to two related interests -- parole and probation. Under the right/privilege analysis, these interests were seen as identical to the interest of the condemned in being spared from execution if incompetent: each had previously been classified only as "privileges," which the state could grant or revoke wholly within its discretion because each "comes as an act of grace to one convicted of crime." Escoe v. Zerbst, 295 U.S. at 492; Ughbanks v. Armstrong, supra. See Solesbee v. Balkcom, 339 U.S. at 11 ("[p]ostponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general"). Despite this view, the Court has since held -- under the state-created rights analysis -- that the states could nonetheless create entitlements to parole and probation that were protected by due process. Such an entitlement was first found in connection with the interest of a parolee in not having his parole arbitrarily revoked, Morrissey v. Brewer, 408 U.S. at 481-82, then applied to the revocation of probation, Gagnon v. Scarpelli, 411 U.S. 778, 782 & n.4 (1973), and finally, to the initial grant of parole, Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 11-12 (1979).

Since the application of the state-created rights analysis has produced these results with respect to probation and parole, the application of this analytical method to the interest of the condemned in being spared from execution when incompetent should produce the same results in a state like Florida, for Florida has created a "justifiable expectation" that a condemned person will not be executed when incompetent by its unconditional prohibition of the execution of the incompetent for more than sixty years.

See, e.g., Ex parte Chesser, 93 Fla. 590, 112 So. 87, 89 (1927); Hysler v. State, 136 Fla. 563, 187 So. 261 (1939); Ford v. Wainwright, 451 So.2d at 475.

Finally, two remaining post-Solesbee developments in due process jurisprudence confirm the necessity of evaluating anew the applicability of the Due Process Clause to the determination of execution competency. These two developments have thoroughly undermined Williams v. New York, supra, upon which the Solesbee Court relied to hold that the Due Process Clause did not protect the interest of the condemned in competency at the time of execution. Solesbee, 339 U.S. at 12. These developments were noted succinctly in Gardner v. Florida.

> First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country.... [Citations omitted.] ... It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
>
> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause....

430 U.S. at 357-58 (footnotes omitted). Because Solesbee was significantly the product of Williams v. New York, Solesbee has effectively been overruled to the same extent as Williams -- by the subsequent jurisprudential developments which led to the application of the Due Process Clause to sentencing proceedings and to the requirement of particularly stringent due process protections in sentencing proceedings that involve the death penalty.

Mr. Ford recognizes that the heightened due process protections which the Court began to require in capital sentencing proceedings in the decade of the 1970's were developed to assure reliability in the decision to impose death, not the decision to carry out an already-imposed (and otherwise legally proper) death sentence. However, the rationale for heightened due process in the sentence imposition proceeding is equally compelling in a proceeding to determine whether to carry out a death sentence

against a person who appears to be incompetent. Because "the penalty of death is qualitatively different from a sentence of imprisonment, however long," Woodson v. North Carolina, 428 U.S. at 305, there must be correspondingly greater reliability in the "determination that death is the appropriate punishment in a specific case." Id. The "qualitatively different" character of a death sentence requires as well that the determination of competency at execution be reliable, even if all the safeguards attendant to the initial sentencing decision are not required. As Justice Frankfurter recognized in his dissent in Solesbee, "Since it does not go to the question of guilt [19] but to its consequences, the determination of the issue of insanity after sentence does not require the safeguards of a judicial proceeding." 339 U.S. at 24. However, the inquiry into competency nevertheless

> must be fair in relation to the issue for determination. In the present state of tentative and dubious knowledge as to mental diseases and the great strife of schools in regard to them, it surely operates unfairly to make such determinations not only behind closed doors but without any opportunity for the submission of relevant considerations on the part of the man whose life hangs in the balance.

Id. at 24-25. Echoing these strains in dissent in Mr. Ford's case, Judge Clark brought the need for "fair[ness] in relation to the issue for determination" into post-Furman perspective:

> Admittedly, we are not reviewing here the question of whether death is the appropriate punishment for Mr. Ford and the procedures used to make that decision. Nevertheless, the procedures used to determine whether the death penalty is a permissible punishment for him at this time is being reviewed. The reliability required for capital decisions is still relevant and adequate procedures to determine the present death eligibility are still required.

752 F.2d at 533 (emphasis in original).

For these reasons, Mr. Ford urges the Court to reconsider the question decided thirty-five years ago in Solesbee.[20]

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19 And, we should now add (in light of post-Furman jurisprudence), to the question of the propriety of the sentence.

20 The request he makes is just as compelling as the request recently made by the petitioner in Ake v. Oklahoma, ___U.S. ___, 105 S.Ct. 1087 (1985), where the Court reconsidered another Solesbee-era due process decision, United States ex

D. The ex parte, non-adversarial, non-record procedure by which the Florida Governor determines competency fails to satisfy the minimum constitutional standards necessary to safeguard the reliability, fairness and accuracy of the competency-determination process.

Under either constitutional theory discussed in the preceding two sections, Florida's procedure for determining competency fails to protect the constitutional interests at stake. At bottom, these interests require that there be a reliable fact-finding procedure for determining the facts of competency. And in this respect, the Florida procedure is an utter failure.

1. Florida's ex parte, non-adversarial procedure

By statute, Florida has created an administrative proceeding for the governor to examine a death-sentenced individual's competency to be executed. Fla. Stat. § 922.097 (1983). In Mr. Ford's case, for the first time, the Supreme Court of Florida held that "the statutory procedure is now the exclusive procedure for determining competency to be executed." Ford v. Wainwright, 451 So.2d at 475.[21]

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rel. Smith v. Baldi, 344 U.S. 561, 568 (1953), because of the erosion of the jurisprudential basis of that decision by subsequent developments. The Court explained that its decision to reconsider Smith was primarily the result of the evolution since Smith of "elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to receive a fair hearing," as well as "the extraordinarily enhanced role of psychiatry in criminal law today." 105 S.Ct. at 1098. The evolution of the "elemental constitutional rights" referred to in Ake is not precisely the evolution that requires reconsideration of the issue previously decided in Solesbee. However, the evolution of the Due Process Clause in the three respects just discussed is parallel to -- and just as significant as -- the evolution that led the Court to reconsider the issue previously decided in Smith.

21 The Florida Court had previously held, prior to the enactment of the statute, that there was a right to a judicial determination by the trial judge where a condemned person was alleged to be incompetent. Ex parte Chesser, 93 Fla. 291, 111 So. 720 (1927); Hysler v. State, 136 Fla. 563, 187 So. 261 (1939). The court had not had an opportunity to address the effect of § 922.07 on this right, however, until 1984, in Mr. Ford's case and in Goode v. Wainwright, 448 So.2d 999 (Fla. 1984). In Goode, decided one month before Mr. Ford's case, the court appeared to leave open the prospect of judicial proceedings for the determination of execution competency. See Goode v. Wainwright, 731 F.2d at 1483 ("he was free to assert this contention in state and federal courts from the time that he was sentenced to death" (emphasis supplied)).

This procedure is ex parte within the executive branch. When the governor is informed that a person may be insane, he must stay the execution of sentence and appoint three psychiatrists to examine the convicted person "to determine whether he understands the nature and effect of the death penalty and why it is is to be imposed upon him." § 922.07(1). The examination is to take place with all three psychiatrists present at the same time. Defense counsel and the prosecutor "may be present at the examination." And if the convicted person has no counsel, the trial court "shall appoint counsel to represent him." Id.

Though provision is made for appointment of counsel, no provision is made for a hearing or other adversarial activity by counsel on behalf of her client. Consistent with these provisions, the present Florida governor has a "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under sentence of death is insane." Goode v. Wainwright, 448 So.2d at 1001 (emphasis supplied).[22] After receiving the report, if the governor "decides" that the convicted person does not meet the competency test set out in the statute, then he orders the person committed to the state hospital. If he "decides" that he meets the test, then the governor issues a death warrant ordering execution. §§ 922.07(2), (3). There are no written findings and there is no judicial review of the decision.

2. Florida's statutory competency-determination procedure fails to provide the reliable fact-finding procedure required by the Constitution's prohibition against execution of the incompetent.

Under Mr. Ford's theory that the Eighth Amendment prohibits execution of the incompetent, the writ of habeas corpus provides a remedy for the enforcement of this guarantee. However, the decision to issue or deny the writ must be made upon reliable and accurate fact-finding. And as we demonstrate, Florida's § 922.07

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22 Thus, as in Solesbee, the Florida Governor makes the competency determination "not only behind closed doors but without any opportunity for the submission of relevant considerations on the part of the man whose life hangs in the balance." 339 U.S. at 25 (Frankfurter, J., dissenting).

procedure -- without more -- cannot provide the kind of accurate and reliable fact-findings upon which a federal habeas court can decide whether the writ should issue.

In order to vindicate federal rights, habeas corpus depends critically upon accurate and reliable fact-finding. If the facts have been reliably found by the state courts on the basis of a full hearing, the federal habeas court need not hold a new fact-finding proceeding. However, if there has been no such fact-finding by the state courts, the federal habeas court must hold a de novo evidentiary hearing. Townsend v. Sain, 372 U.S. 293, 312 (1963). If Mr. Ford's claim that the Eighth Amendment prohibits the execution of the incompetent is well-taken, the federal habeas court must, therefore, hold an evidentiary hearing to determine the factual questions underlying his competency, "unless the state-court trier of fact has after a full hearing reliably found the facts." Id. at 312.[23]

As we have shown, in Mr. Ford's case neither the governor, the state courts, nor the District Court held an evidentiary hearing. There was only an ex parte § 922.07 proceeding. And even if a non-judicial state trier of fact could make reliable fact-findings, the governor acting under § 922.07 cannot.[24] The 922.07 proceeding in Mr. Ford's case was woefully inadequate when measured against the Townsend standard. As just noted, the fact-finder was not a court; moreover, there was no hearing, much less a full and fair hearing, to serve as a basis for fact-finding; and there were no findings of fact, except for those implied in the finding that Mr. Ford was competent by virtue of his death warrant having been signed. Finally, there was no

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23 As the Court made clear in Maggio v. Fulford, 462 U.S. 116 (1983), resolution of the facts underlying a competency claim may, like any other factual matter, be determined in the state courts.

24 Townsend, as well as its statutory counterpart, 28 U.S.C. § 2254 (d), have always required a court to find the facts in order to assure the reliability of the fact-finding process.

judicial review of the governor's implied fact-finding or his fact-finding procedure; nor can there be under the Florida Supreme Court's decision in Mr. Ford's case.[25]

While these defects in the 922.07 proceeding, without further discussion, clearly compel a de novo hearing in the district court, it is worth emphasizing why this is so. The Townsend Court's requirement of fact-finding on the basis of a full and fair hearing -- as the only acceptable means of assuring reliable fact-finding -- is well-rooted in the Court's jurisprudence, both before and after the Townsend decision. The Court has long recognized that a hearing is necessary to provide the "adversarial debate our system recognizes as essential to the truth seeking function," Gardner v. Florida, 430 U.S. at 359, for "no better instrument has been devised for arriving at the truth," Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring). See also Goss v. Lopez, 419 U.S. 565, 579 (1975); Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Mullane v. Central Hanover Trust Co, 339 U.S. 306, 313 (1950).

There is no more compelling example of the crucial role of the hearing in the truth seeking function than in the resolution of mental health issues. As the Chief Justice has observed, "The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." Addington v. Texas, 441 U.S. 418, 430 (1979). It is for this reason that juries or judges -- lay fact-finders -- retain the fact-finding role in determining mental health issues. But without a hearing, in which the experts explain their opinions, as well as the data and reasoning process upon which their opinions are based, lay fact-finders cannot make accurate, reliable determinations of mental health facts when the experts' opinions are in conflict. Although made in the context of explaining the crucial role of an

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25 Cf. Mattheson v. King, 751 F.2d 1432, 1447 (5th Cir. 1985) (deferring to state court's determination of competency following an evidentiary hearing, though not deciding whether the Constitution prohibits execution of the mentally incompetent).

expert in the process of resolving mental health issues, the Court's observations in Ake v. Oklahoma are equally insightful in explaining the crucial role of a hearing in the resolution of these issues.

> Psychiatry is not ... an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences of opinion within the psychiatric profession on the basis of the evidence offered by each party .... By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them.

105 S.Ct. at 1096. Without a hearing, however, the crucial process of experts "laying out their investigative and analytic process" to the factfinder -- in the cauldron of adversarial debate -- cannot occur, and the "most accurate determination of the truth" cannot be made.

Accordingly, because it provides for no full and fair hearing upon which the facts must be reliably found, the 922.07 procedure fails to provide the kind of fact-finding procedure necessary to determine whether the Eighth Amendment's prohibition against executing the incompetent applies in a particular case

3. Florida's statutory competency-determination procedure fails to provide the reliable fact-finding procedure required by the Constitution in the administration of the state-created right to be spared from execution if incompetent

With respect to the Fourteenth Amendment claim, once a state-created entitlement or substantive right is identified, the extent of procedural protection required by the Constitution must then be ascertained. Since "[a] procedural rule that may satisfy due process in one context may not satisfy procedural due process in every case," Bell v. Burson, 402 U.S. at 540, in order to determine the procedural safeguards that are due, the Court has employed a balancing process that weighs three factors:

the private interest that will be affected by the government action at issue, the public interest that will be affected if the safeguards are provided, and the probable effect such safeguards will have on reducing the risk of erroneous decisions. See Logan v. Zimmerman Brush Co., 455 U.S. at 434; Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17-18 (1978); Dixon v. Love, 431 U.S. 105, 112-15 (1977); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). See also Ake v. Oklahoma, 105 S.Ct. at 1094. When applied in the context of determining competency at the time of execution, these factors weigh in favor of requiring the state courts to provide the very same procedural safeguards in enforcing the state substantive right which they must provide if, in the context of the Eighth Amendment claim, their fact-findings are to be sufficiently reliable to avoid the need for a federal evidentiary hearing: a full and fair evidentiary hearing, on the basis of which the fact-finder reliably finds the relevant facts.

The private interest that is affected by a state's determination of competency at the time of execution is obvious and compelling: the right of a condemned person to have a final opportunity to assert matters known only to him which would make his execution unlawful or unjust, as well as the right to appreciate the meaning of, and to prepare for, the termination of his life. Just as compelling is the interest of the condemned that his competency be determined accurately, for only by accurate determination will the interests of the truly incompetent be protected. While the Court has "repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case," Ake v. Oklahoma, 105 S.Ct. at 1097, that interest clearly extends to the determination of competency at the time of execution.

The public interest has three aspects. The first two -- the interest in reducing the cost of criminal proceedings and the interest in avoiding undue delay in executions occasioned by frivolous claims of incompetence -- weigh against additional safeguards. The third -- the interest in sparing the truly

incompetent from execution -- weighs in favor of additional safeguards. With respect to costs, Florida already pays three psychiatrists to evaluate the condemned. The additional cost occasioned by a hearing should not be burdensome, and in any event, "'does not justify denying a hearing meeting the ordinary standards of due process,'" Goldberg v. Kelly, 397 U.S. at 261. See also Bell v. Burson, 402 U.S. at 540-41. With respect to undue delay, the courts and the states are well-equipped, under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts and Rules 12 and 56 of the Rules of Civil Procedure, to dispose quickly and efficiently of frivolous claims. These or similar devices could be incorporated into state hearing procedures.[26] Where a claim of incompetency is not frivolous, as in Mr. Ford's case, "the time invested in ascertaining the truth will surely be well spent if it makes the difference between life and death." Gardner v. Florida, 430 U.S. at 360.

The interest of the public that will be affected most significantly by the safeguards is the same as the interest of the condemned: the interest in accurate determinations of competency, to avoid executing the truly incompetent. Accord Ake v. Oklahoma, 105 S.Ct. at 1094-95 ("[t]he State's interest in prevailing at trial ... is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases"). Moreover, when life and death are at issue, the Court's post-Furman jurisprudence demands that the interest in reliability and accuracy be given paramount importance. Id. at 1097 ("[t]he State ... has a profound interest in assuring that its ultimate

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[26] However, the Court should take notice that there has not been -- nor is there any sign that there will be in the future -- a flood of frivolous claims of incompetence. Governor Graham has signed well over 100 death warrants in his six-and-one-half years in office, and in only four of the death warrant cases have claims of incompetence been asserted. Fears of frivolous claims and undue delay have been raised for centuries, but the courts have always been found capable of dealing with the "difference between pretenses and realities." Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 State Trials 474, 478 (1816). See also 1 M. Hale, The History of the Pleas of the Crown 35 (1736).

sanction is not erroneously imposed"). Accordingly, the public interest is very much in accord with Justice Frankfurter's expression of it in his Solesbee dissent:

> It is a groundless fear to assume that it would obstruct the rigorous administration of criminal justice to allow the case to be put for a claim of insanity, however informal and expeditious the procedure for dealing with the claim. The time needed for such a fair procedure could not unreasonably delay the execution of the sentence unless in all fairness and with due respect for a basic principle in our law the execution should be delayed. The risk of an undue delay is hardly comparable to the grim risk of the barbarous execution of an insane man because of a hurried, one-sided, untested determination of the question of insanity, the answers to which are as yet so wrapped in confusion and conflict and so dependent on elucidation by more than one-sided partisanship.

339 U.S. at 25.

Finally, as we have already shown, a full and fair evidentiary hearing is the only procedural mechanism that assures the accurate determination of the truth of a claim of incompetence. Accordingly, the probable effect of such a safeguard is to reduce the risk of erroneous decisions. Without it "the risk of an inaccurate resolution of sanity issues is extremely high," Ake v. Oklahoma, 105 S.Ct. at 1096.

For these reasons, the Fourteenth Amendment demands that the states determine competency, under a state-created right to be spared from execution if incompetent, on the basis of a full and fair evidentiary hearing. Without this, the Constitution cannot tolerate the execution of one who appears to be incompetent.

E. Alvin Ford's competency cannot be reliably determined without an evidentiary hearing

Notwithstanding the preceding argument, there may be rare cases in which competency can be reliably determined without an evidentiary hearing. Where psychiatric and psychological opinion respecting competency is unanimous, a finding of competence or incompetence may well be reliable. But where opinions differ, no accurate resolution can be made in the absence of a hearing, where the competing views of competent professionals can be explained, and the more accurate view determined. This principle is at the heart of Ake v. Oklahoma, and it is also at the

heart of Mr. Ford's case. Indeed there can be no better example than Mr. Ford's case of the critical need for an evidentiary hearing.

In his case, psychiatric opinion was nearly uniform that he suffers from a severe form of psychosis.[27] However, the conclusions drawn concerning his competency, in light of that psychosis, were sharply conflicting. The psychiatrist who spent the most time interviewing Mr. Ford, under conditions conducive to reliable psychiatric assessment, and who most carefully reviewed Mr. Ford's history as well as the opinion of psychiatrists who had previously evaluated him, concluded that he is incompetent, because his psychotic delusional processes have fundamentally impaired his ability to understand why he is to be executed. The other psychiatrists who also concluded that Mr. Ford is psychotic, determined nevertheless, that Mr. Ford is competent. However, these psychiatrists offered no explanation as to how this conclusion could be squared with Mr. Ford's psychotic delusional processes. In the opinion of nationally-acclaimed experts in forensic psychiatry, the conclusions of this latter group of psychiatrists were, accordingly, unreliable -- precisely because they failed to account for the compelling data that linked Mr. Ford's delusional processes to incompetency. Upon analysis of these conflicting opinions, the Court will see quite clearly that the conflicts cannot be resolved accurately in the absence of a hearing, where the psychiatrists "organiz[e] [Mr. Ford's] mental history, examination results and behavior, and other information, interpret[] it in light of their expertise, and then lay[] out their investigative and analytic process to the [factfinder] ...." Ake v. Oklahoma, 105 S.Ct. at 1096. Such an analysis shows the following:

(1) In the two-year period following December, 1981, Alvin Ford's mental health gradually but devastatingly deteriorated. Mr. Ford's deteriorating mental health was documented in two

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27 Only one of the five psychiatrists who evaluated Mr. Ford (Dr. Ivory) found him free of psychosis, and as we demonstrate infra, because that psychiatrist's evaluation was procedurally inadequate, his opinion cannot be credited.

ways: by his voluminous correspondence and by periodic psychiatric evaluation, at the request of counsel for Mr. Ford, by Dr. Jamal Amin.

(2) A sampling of Mr. Ford's correspondence was set forth in the habeas petition filed in the District Court. See App. 51a-94a. This correspondence showed a gradual but relentless loss of contact with reality from December, 1981, forward. Over time, Mr. Ford expressed, in his correspondence, virtually all the recognized hallmarks of psychosis, particularly of paranoid schizophrenia. He expressed bizarre delusions; grandiose and religious delusions without persecutory or jealous content; delusions with persecutory content, accompanied by hallucinations; auditory hallucinations in which two or more voices conversed with each other; and finally, incoherence, marked loosening of associations, markedly illogical thinking, and poverty of content of speech, associated with blunted, flat, or inappropriate effect. See American Psychiatric Association, Diagnostic and Statistical Manual of Disorders at 188-190.

(3) During the period of time that Mr. Ford's mental health was deteriorating, Dr. Amin conducted four separate in-person evaluations of Mr. Ford, ending with an interview in August, 1982. Dr. Amin also reviewed the correspondence from Mr. Ford; talked with Mr. Ford's relatives, with his attorneys, and with other inmates, prison personnel, and other people who had directly observed Mr. Ford's behavior over this period of time; and reviewed Mr. Ford's mental health and medical records maintained at Florida State Prison. On the basis of the data he reviewed from all these sources, Dr. Amin identified the above-noted features of psychosis and concluded on June 9, 1983, that Mr. Ford suffered, in an "overwhelmingly convincing" fashion, from paranoid schizophrenia. See App. 153a-155a.

(4) On the basis of this history, Dr. Amin's evaluation, and Mr. Ford's continuing deterioration after Dr. Amin's evaluation, counsel for Mr. Ford initiated a § 922.07 proceeding on behalf on Mr. Ford on October 20, 1983.

(5) Because at that time, Mr. Ford would no longer talk with Dr. Amin (due to his delusional belief that Dr. Amin was persecuting him along with members of the Klu Klux Klan who served as correctional officers at Florida State Prison), counsel for Mr. Ford requested that another psychiatrist, Dr. Harold Kaufman, of Washington, D.C., interview and evaluate Mr. Ford. Prior to his evaluation, Dr. Kaufman reviewed the history of Mr. Ford's illness as well as Dr. Amin's evaluation of Mr. Ford. On the basis of this review and his lengthy interview with Mr. Ford, Dr. Kaufman agreed with Dr. Amin that Mr. Ford suffered from schizophrenia. Moreover, because at this time Mr. Ford's competency had come into question, Dr. Kaufman assessed Mr. Ford's competency in light of the criteria set forth in § 922.07. Dr. Kaufman concluded as follows:

> It is my conclusion, using the Florida statutory standard you have supplied me with, that because of his psychiatric illness, while he does understand the nature of the death penalty, he lacks the mental capacity to understand the reasons why it is being imposed on him. His ability to reason is occluded, disorganized and confused when thinking about his possible execution. He can make no connection between the homicide that he committed and the death penalty. Even when I pointed this connection out to him he laughed derisively at me. He sincerely believes that he is not going to be executed because he owns the prisons, could send mind waves to the governor and control him, President Reagan's interference in the execution process, etc.

App. 158a.

(6) Thereafter, in early December, 1983, Governor Graham appointed three psychiatrists pursuant to § 922.07 to evaluate Mr. Ford: Dr. Umesh Mhatre, Dr. Walter Afield, and Dr. Peter Ivory. On December 15, 1983, four days before their scheduled interview with Mr. Ford, counsel for Mr. Ford provided each of these doctors with an excerpt of the transcript of Mr. Ford's trial in December, 1974, in which a psychiatrist had provided a "psychiatric profile" of Mr. Ford (to provide to the doctors in 1983 a psychiatric baseline against which to measure Mr. Ford's then-current condition), a large sampling of the correspondence from Mr. Ford over the period of time that his mental health had

deteriorated, the psychiatric evaluation by Dr. Amin, and the psychiatric evaluation by Dr. Kaufman. While Dr. Mhatre and Dr. Afield accepted these materials, Dr. Ivory refused them.

(7) On December 19, 1983, Dr. Mhatre, Dr. Afield, and Dr. Ivory conducted an interview with Mr. Ford in the courtroom at Florida State Prison. Present in the courtroom along with the three psychiatrists and Mr. Ford, were counsel from Governor Graham's office, one or two correctional officers, two paralegals who had worked with Mr. Ford, and the two lawyers who had worked with Mr. Ford. The interview lasted approximately thirty minutes. During the course of the interview, the psychiatrists asked very simple, straight-forward questions directed to whether Mr. Ford understood the nature and effect of the death penalty and why the death penalty was being imposed upon him. He responded in the same bizarre manner to these questions as he had responded in an interview with counsel on December 15, 1983. See App. 160a and 102a-107a.

(8) After approximately thirty minutes, the three psychiatrists determined that further interview of Mr. Ford would be fruitless and terminated the interview. Thereafter, they requested that they be able to examine Mr. Ford's cell. They were allowed to do that, and after this inspection, they reviewed Mr. Ford's prison medical records and discussed his condition with the prison's correctional and medical staff.

(9) Before leaving the prison on December 19, 1983, Dr. Ivory requested that he be provided the historical materials and other psychiatric evaluations of Mr. Ford which he had refused on December 15. A copy was provided at approximately noon on December 19, 1983.

(10) On December 20, 1983, Dr. Ivory sent his report to Governor Graham. By his own report, Dr. Ivory based his opinion solely upon the thirty-minute interview with Mr. Ford, the examination of Mr. Ford's cell, and the conversations Dr. Ivory had with prison personnel concerning Mr. Ford. See App. 160a-162a. On the basis of this data, Dr. Ivory concluded that "in spite of the verbal appearance of severe incapacity, from his

consistent and appropriate general behavior, [Mr. Ford] showed that he is in touch with reality," and that he "comprehend[ed] his total situation including being sentenced to death, and all of the implications of that penalty." Id.

(11) Without considering Mr. Ford's documented history of psychosis or the opinions of Dr. Amin and Dr. Kaufman respecting Mr. Ford's condition, however, Dr. Ivory was at a distinct disadvantage, for the interview with Mr. Ford on December 19 presented only a very small part of a much larger picture.[28] The only symptom of illness presented there was marked incoherence of speech. Because of his refusal to consider matters not apparent in the interview on December 19, rather than evaluating this symptom in the context of all of Mr. Ford's other previously documented symptoms of illness, Dr. Ivory treated this symptom as the only one. Within this framework, when he observed Mr. Ford's alert and appropriate non-verbal behavior during the interview, his well organized cell, and his apparent ability to function independently on a day-to-day level, he found a sharp conflict with the "pervasive disorganization" suggested by Mr. Ford's verbal behavior during the interview. Thus, Dr. Ivory quite naturally concluded that Mr. Ford's "disorder, although severe, seems contrived and recently learned." The pervasiveness of the disorder suggested by his verbal behavior simply was not confirmed by anything else Dr. Ivory observed.

(12) On December 28, 1983, Dr. Mhatre sent his report to Governor Graham. Unlike Dr. Ivory, Dr. Mhatre did review the documented history of Mr. Ford's psychosis, as well as the prior evaluations by Dr. Amin and Dr. Kaufman. On the basis of his

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28 To avoid misdiagnosis due to failure to consider all the possible -- and varied -- manifestations of mental illness, the psychiatric profession has for many years maintained that a comprehensive examination is necessary before a diagnosis can be reached. At a minimum, such examination requires a thorough review of medical and psychiatric history, as well as prior psychiatric assessments. The history "focuses on those factors affecting growth and development as they pertain to the patient's physical, social, intellectual, and interpersonal functioning." H. Kaplan, B. Sadock, Comprehensive Textbook of Psychiatry 487-88 (Fourth Edition 1985). See also S. Arieti, American Handbook of Psychiatry 1161 (Second Edition 1974).

review of these materials, along with his interview with Mr. Ford, his inspection of Mr. Ford's cell, and his conversations with prison personnel, Dr. Mhatre concluded that Mr. Ford suffers from "psychosis with paranoia." App.163a-164a. Nonetheless, Dr. Mhatre also concluded that Mr. Ford was competent under the criteria set forth in § 922.07:

> In spite of psychosis, he has shown ability to carry on day-to-day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him. It is my medical opinion that though Mr. Ford is suffering from psychosis at the present time, he has enough cognitive functioning to understand the nature and the effects of the death penalty and why it is to be imposed upon him.

App. 164a. Dr. Mhatre gave no further indication of the reasoning process that brought him to this conclusion about competency. He did not attempt to explain the apparent contradiction between finding Mr. Ford psychotic -- the central feature of which was his delusions, and in particular, his belief that he could not be executed -- with his finding of competency under the criteria of the Florida statute.[29] Despite this gap in Dr. Mhatre's reasoning process, he did predict that if left untreated Mr. Ford would likely become incompetent. App. 164a. Six months later, without treatment, Mr. Ford's condition did substantially worsen. App. 167a-168a. Dr. Mhatre's opinion concerning competency was, therefore, accurate in this respect.

(13) On January 19, 1984, Dr. Afield sent his report to Governor Graham. On the basis of his review of all the data concerning Mr. Ford -- his correspondence, the evaluations by Dr. Amin and Dr. Kaufman, the interview with Mr. Ford, the conversations about Mr. Ford with prison personnel, the inspection of Mr.

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[29] Dr. Mhatre's finding that Mr. Ford "has shown ability to carry on day-to-day activities, and relate to his fellow inmates and guards, and appears to understand what is happening around him," does not support his conclusion that Mr. Ford is able to perceive external reality -- particularly as to why he may be executed -- in an accurate manner. His finding shows only that Mr. Ford appears to function adequately and appropriately on a day-to-day level. But the ability to function in such a way does not avoid the psychiatrist's obligation to assess the pertinent delusional processes, for "[the] impairment in functioning may be minimal if the delusional material is not acted upon, since gross disorganization of behavior is extremely rare." American Psychiatric Association, Diagnostic and Statistical Manual at 191.

Ford's cell, and the review of Mr. Ford's prison medical records -- Dr. Afield concluded that while Mr. Ford "does not fit any classical description of psychiatric illness," the profoundness of his disorganization "forces me to put a 'psychotic' label on the inmate." App. 166a. Notwithstanding this diagnosis, Dr. Afield also concluded that "although this man is severely disturbed, he does understand the nature of the death penalty that he is facing and is aware that he is on death row and may be electrocuted. The bottom line in summary is, although sick, he does know fully what can happen to him." Id. Dr. Afield reported nothing further concerning his evaluation of Mr. Ford.

(14) It is thus apparent that Dr. Afield failed to express an opinion on the matter that was at issue: whether Mr. Ford understood why the death sentence would be carried out against him. Dr. Afield limited his opinion to the determination that Mr. Ford understood the nature of the death penalty and that he may be electrocuted. He did not determine whether Mr. Ford understood why he may be electrocuted.[30] Accordingly, Dr. Afield's report not only failed, as did Dr. Mhatre's report, to evaluate the delusional material which is centrally relevant to the competency determination and which he apparently relied upon in concluding that Mr. Ford was psychotic, but also failed altogether to address the question upon which the competency determination concerning Mr. Ford must rest: whether he understands why the death penalty is to be imposed upon him.

(15) In preparation for an evidentiary hearing on this matter, counsel for Mr. Ford asked two experts in the field of forensic psychiatry to review the manner in which Mr. Ford was evaluated by the three psychiatrists appointed by Governor Graham. Dr. Seymour Halleck, a nationally-recognized scholar and practitioner, concluded that the process by which the three

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30 Clearly there is a difference between understanding that you may electrocuted and why you may be electrocuted. Mr. Ford understands that he may be electrocuted ("maybe because I am a smart ass," Appendix 157a), but he does not understand accurately why he may be electrocuted ("I won't be executed because of no crime.... I can't be executed because of the landmark case. I won." Appendix 157a-158a).

appointed psychiatrists evaluated Mr. Ford, "fell below the generally accepted standard of care necessary to produce a reliable forensic psychiatric evaluation." App. 171a. Dr. Halleck gave three reasons for this conclusion. First, the crowded and impersonal conditions under which the interview was conducted, as well as the inordinately short amount of time spent interviewing Mr. Ford, were unlikely to produce sufficient data for reliable forensic evaluation. App. 171a.[31] Second, Dr. Ivory may not have considered the reports of Dr. Amin and Dr. Kaufman, or other available information, in making his evaluation of Mr. Ford, and this lack of data could have seriously compromised the quality of his examination. App. 172a.[32] Third, all three of the psychiatrists

> failed to account for the facts contained in [Mr. Ford's] history which were central to the forensic task at hand: whether Mr. Ford's delusional processes which, among other things, had led him to believe that he had won his case and could no longer be executed, were relevant to the issue or his incompetence, in that he failed to understand why he was to be executed, or as Dr. Kaufman put it, failed to understand "the purpose" of his execution. Dr. Kaufman had previously concluded that Mr. Ford was incompetent precisely because of his delusional processes. Yet neither Dr. Ivory, Dr. Mhatre or Dr. Afield dealt with this most crucial data in their reports.

App. 172a.[33]

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31 See also S. Halleck, Law in the Practice of Psychiatry 201 (1980); S. Pollack, Psychiatric Consultation for the Courts, 1 Bull. Am. Acad. Psych. & L. 267, 275-76 (1973) [hereafter cited "Pollack"].

32 See n.28 supra.

33 "The purpose of the psychiatric-legal report is to furnish data for legal disposition which will be effected by attorney, judge, or jury. The most significant data are the psychiatrist's conclusions about this legal disposition. In his explanation of the reasoning which led to hi conclusions, the psychiatrist must adopt the logical reasoning approach followed by the legal system. **In these psychiatric reports, the organization of material should be determined by this logical reasoning rather than by the empirical approach used in medicine.** For example, description of psychopathological phenomena and elaboration of psychodynamics have no significance and are unnecessary unless they can logically be related to the legal issue. **The psychiatrist's reasoning in establishing and demonstrating this relationship is crucial. Upon psychiatric reasoning, not psychiatric conclusion or opinion, will depend the weight and value which the court or jury accords the report.**" Pollack at 277-78 (footnote omitted) (emphasis in original). Accord American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic

(16) The other expert in forensic psychiatry with whom Mr. Ford's counsel consulted was Dr. George Barnard, a professor in the Department of Psychiatry at the University of Florida. Dr. Barnard agreed with the three observations made by Dr. Halleck with respect to the inadequacy of the evaluations conducted by Dr. Ivory, Dr. Mhatre, and Dr. Afield. Moreover, Dr. Barnard took specific issue with Dr. Ivory's great reliance on the state of Mr. Ford's cell:

> Dr. Ivory expressed his belief that because Ford had a clean and organized cell that this indicated to him that Ford could not have a disorganized mind or thought system in that insanity was not selective but pervasive. To this reviewer, it appears that Dr. Ivory is of the opinion that there is a significant correlation between disorganization of internal thoughts and the way that one keeps a room. From my understanding of the literature it is apparent that one can be highly disorganized internally and yet keep a clean room as well as one can be highly disorganized in the way he keeps his room and yet be very organized and productive in his thought processes.

App. 190a.[34] In concluding, Dr. Barnard gave particular emphasis to the failure of all three appointed psychiatrists to confront and explain in any rational way why the obvious and marked delusions suffered by Mr. Ford did not, in their opinions, make Mr. Ford incompetent:

> The materials which I reviewed give evidence of documenting symptoms in Ford which are consistent of the diagnosis of schizophrenia, paranoid type. These symptoms include delusions of persecution, delusions of grandeur, thought blocking, thought insertion, thought broadcasting, flat affect, loosening of associations and disturbance of speech with word gibberish. In the psychiatric interview conducted by the three examiners appointed by the Governor, Ford was uncooperative and he gave them few meaningful verbal responses so that they relied heavily upon his nonverbal productions and their ability to read between the lines for what he might be meaning with his nonsensical replies to their questions. In my opinion, the three examiners give conclusionary opinions about Ford's competency to be executed without documenting in a satisfactory manner their evidence or facts upon which their inferences are based. As a result, in my opinion, the factfinder and, in this case, Governor Graham and/or the Court is left with the dilemma of depending on conclusionary belief statements by the psychiatrists that

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Psychiatry 206 (1984).

34 See n.29, supra.

> Ford is competent to be executed without adequate documentation by the psychiatrists so that the factfinder must rely on the credentials of the psychiatrists rather than data. In my opinion, this leaves the factfinder in a very unsatisfactory position....

App. 192a-193a.

Accordingly, there was sharply divergent opinion concerning Mr. Ford's competency, notwithstanding the nearly unanimous opinion concerning his suffering from schizophrenia. The psychiatrist who found Mr. Ford both psychotic and incompetent fully documented the facts, as well as the reasoning, that led him to that conclusion. The psychiatrists who found Mr. Ford psychotic but competent documented, to some extent, the basis for their conclusions that Mr. Ford was psychotic, but failed to explain at all why, suffering from this condition, Mr. Ford was nevertheless competent. And finally, the psychiatrist who found Mr. Ford to be free of psychosis and competent appeared not to have considered at all the data crucial to such a determination and, in the opinion of forensic experts, could not therefore be credited as having reached a reliable conclusion.

On the basis of these facts, Mr. Ford could not be found competent without a hearing. The "paper record" would not support such a finding. Only in a hearing -- where the factfinder could hear all the psychiatrists respond to questions regarding their investigative and analytic processes -- could a reliable determination be made that Mr. Ford is competent. In the absence of such a hearing, the governor's determination that Mr. Ford is competent affords no assurance that he is.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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